Supreme Court, U.S.
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90-61

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATHANIEL JOHNSON, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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JULY 1990

QUESTION PRESENTED

Whether the charge of aggravated assault, as charged under Article 128, Uniform Code of Military Justice, is unconstitutionally vague as applied to petitioner, when the aggravation element is premised upon the petitioner's medical condition of being infected with the Human Immunodeficiency Virus (HIV).

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The petitioner, Nathaniel Johnson, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on April 12, 1990.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review, is reported at 27 M.J. 798 (A.F.C.M.R. 1988). The opinion of the United States Court of Military Appeals is reported at 30 M.J. 53 (C.M.A. 1990).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(h) (Supp. III

1985). The judgment of the Court of Military Appeals was entered on April 12, 1990.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

Petitioner was tried by general court-martial in February 1988, at McChord Air Force Base, Washington. He was convicted of consensual sodomy by fellatio, and of aggravated assault and attempted sodomy, both premised on an act of attempted consensual anal intercourse.

He was sentenced to a dishonorable discharge, confinement for 10 years, total forfeitures and reduction to airman basic. The convening authority approved these results on April 20, 1988. The United States Air Force Court of Military Review dismissed the charge of attempted consensual sodomy, finding it multiplicious for findings with the charge of aggravated assault. The Court then affirmed the findings and modified the sentence to a dishonorable discharge, six years confinement, total forfeitures and reduction to E-1.

Petitioner was screened for the Human Immunodeficiency Virus (HIV) in July 1987. He tested positive for the virus and was sent to Wilford Hall Medical Center for medical evaluation. He was determined to be in fact infected with the disease, but displayed no abnormalities of his immune system.

During his stay at Wilford Hall, petitioner was instructed on the disease and on means of safe sex or low risk sex/behavior. Patients at Wilford Hall are not told they must abstain from sexual activity. Rather, they are instructed on the use of condoms, and other safe sex

practices. *United States v. Johnson*, 27 M.J. 798, 801 (A.F.C.M.R. 1988). Petitioner acknowledged his understanding of his responsibility to protect others from possible transmission on a pass privileges form for HIV patients. *Id.*

Petitioner remained a patient at Wilford Hall until October 4, 1987. On September 23, 1987, the Air Force implemented a revised Department of Defense policy concerning HIV infected persons. This policy directive required that each HIV infected military member be ordered by his immediate commander to follow the preventive medical counselings and informed that their failure to do so may result in administrative or disciplinary action. Petitioner was never given such an order, nor informed that his failure to follow his medical counselings might result in disciplinary actions against him. *Id.*

On December 13, 1987, petition met JPH, a 17 year old male. The two went to petitioner's dormitory room and proceeded to drink. The two began to kiss, and eventually petitioner performed fellatio on JPH. He then attempted to place his finger in JPH's anus. JPH hold petitioner to stop, which petitioner did. JPH claimed he then felt the accused's unsheathed, flaccid penis between his legs, although no attempt was made by petitioner to insert his penis into JPH's anus. JPH became sick, and eventually, petitioner drove JPH to his home.

REASONS FOR GRANTING THE WRIT

An accused is entitled to a fair notice of the law. Failure to define a criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited results in a denial of due process. *See, Kolender v. Lawson*, 461 U.S. 352 (1983). Whether or not a criminal statute is unconstitutionally vague must be judged in light of the conduct that is charged to be violative of the statute. *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *See, United States v. Powell*, 423 U.S. 87 (1975). Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is forbidden. *United States v. Harris*, 347 U.S. 612, 617 (1954); *Parker v. Levy*, 417 U.S. 73, 747 (1974).

In the present case, petitioner's act was that of engaging in consensual homosexual activity. Certainly he was provided adequate notice that he could be held criminally liable for his acts of consensual sodomy, as was noted by the United States Court of Military Appeals in their opinion below. *United States v. Johnson*, 30 M.J. 53, 56 (C.M.A. 1990). The Court, however, went one step further and determined that this notice, combined with petitioner's awareness of his being infected with HIV, provided him adequate notice that this conduct could make him additionally vulnerable to the offense of aggravated assault.[1]

The elements of aggravated assault under Article 128, Uniform Code of Military Justice, are:

(1) that the accused attempted to do, offered to do, or did bodily harm to a certain person;

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[1] Note, however, Chief Judge Everett's concurring opinion, wherein he suggests the preferrable option in a case such as this would be to affirm a finding of attempted sodomy, and then consider the HIV infection as a factor in aggravation of that offense. *United States v. Johnson*, 30 M.J. 53, 58 (C.M.A. 1990). (C.J. Everett, concurring).

(2) that the accused did so with a certain weapon, means or force;

(3) that the attempt, offer or bodily harm was done with unlawful force or violence;

(4) that the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

Although the elements of aggravated assault are clearly stated, and Article 128 is not challenged here as unconstitutionally vague on its face, when the "means" of the attempted bodily harm is the possible transmission of a virus, such as HIV, Article 128 becomes unintelligible regarding the conduct it seeks to proscribe.

In her article, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, Captain Wells-Petry begins her attempt to justify charging AIDS-related misconduct under Article 128 by stating that we must view the sexual conduct "as though under a microscope." Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, Army Lawyer, January 1988, at 23. Even Judge Kastl admits that assault by AIDS virus appears novel and must be analyzed in some detail. *United States v. Johnson*, 27 M.J. 798, 802 (A.F.C.M.R. 1988). We must stretch far beyond our present legal familiarity with Article 128 terminology of "bodily harm", "grievous bodily harm" and "means or force likely" in an effort to plead an AIDS-related case under Article 128. The offensive touching for "bodily harm" is no longer the sexual touching, but rather, placing the HIV at the door of the victim's immune system. The "grievous bodily harm" must then be the transmission of the virus into the victim's bloodstream. The "means" is the HIV which the carrier *may* transmit through unprotected sexual activity, although the experts are unable to provide any clear idea as to the likelihood of transmission. When experts, courts and legislatures cannot define a crime without confronting the

difficulties faced in applying Article 128 to AIDS-related conduct, then neither should petitioner be expected to do so. The need to apply such a microscopic and detailed analysis in order to creatively fit AIDS-related misconduct under Article 128, clearly denies him or any HIV carrier of fair notice that his conduct could make him criminally liable under this particular offense.

This is not to say that HIV-related offenses could never be properly charged as aggravated assault. If an HIV infected individual bites another, with the intention of using his virus to harm the individual by transmitting the virus to his victim, it is reasonable to assume that he is on notice that his conduct is forbidden under Article 128.[2] But where there is no such intentional attempt to use one's own medical condition to injure another, are we not simply holding a contagious person criminally responsible for *any* action on their part which may possibly result in the transmittal of their disease? The offense of aggravated assault was never intended nor does it provide adequate notice that any transmission of one's contagious condition, regardless of intention, will result in criminal liability.

CONCLUSION

Our society is clearly inflamed with hysteria over the HIV epidemic. This often results in a callous indifference or overt hostility towards persons infected with HIV. However, we cannot allow our legal system to be improperly used as a tool for the further prosecution of HIV carriers. Although certain behaviors by HIV infected persons may appropriately fall under specific criminal sanctions, our judicial system should not turn a blind eye to the requirements of proof so as to arduously fit HIV conduct into an ill-fitting, inappropriate of-

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[2] *Cf., United States v. Moore*, 669 F.Supp. 289 (D. Minn. 1987), *aff'd*, 846 F.2d 1163 (8th Cir. 1988); *United States v. Kazenbach*, 824 F.2d 649 (8th Cir. 1987).

fense, for which inadequate notice is given, solely for the purpose of increasing the amount of punishment one can receive.

Therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

JULY 1990

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 61,753

ACM 26812

UNITED STATES,

Appellee,

v.

NATHANIEL JOHNSON, JR., Sergeant, U.S. Air Force,

Appellant.

April 12, 1990

For Appellant: *Major Lynne H. Wetzell* (argued); *Colonel Richard F. O'Hair* (on brief).

For Appellee: *Major Terry J. Petrie* (argued); *Colonel Joe R. Lamport* (on brief); *Colonel Robert E. Giovagnoni.*

Opinion of the Court

COX, Judge:

Appellant was tried by general court-martial before a military judge alone for knowingly exposing a 17-year-old male to the Human Immunodeficiency Virus (HIV). It was established at trial that HIV is the disease-causing, viral agent in the incurable, fatal illness called AIDS (Acquired Immunity Deficiency Syndrome). After mixed pleas, he was found guilty of attempted consensual sodomy, consensual sodomy, and assault with a means likely to produce death or grievous bodily harm, to wit: attempted anal intercourse while knowingly in-

fected with HIV, in violation of Articles 80, 125, and 128, Uniform Code of Military Justice, 10 USC §§ 880, 925, and 928, respectively. He was sentenced to confinement for 10 years, total forfeitures, reduction to E-1, and dishonorable discharge. The convening authority approved the sentence as adjudged. The Court of Military Review approved the findings, but reduced the confinement to 6 years. 27 MJ 798, 805 (1988).[1]

After reviewing appellant's supplement to his petition, this Court specified two issues for consideration:

I

WHETHER A SPECIFICATION ALLEGING AGGRAVATED ASSAULT WITH A MEANS LIKELY TO PRODUCE DEATH OR GREVIOUS BODILY HARM, TO WIT: THE HUMAN IMMUNODEFICIENCY VIRUS, ALLEGES AN OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

II

WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN A VALID CONVICTION IN THE PRESENT CASE.

In September 1987, while attached to McChord Air Force Base, Washington, appellant learned that he had

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[1] The Court of Military Review found attempted anal sodomy and aggravated assault by means of the AIDS virus (Charges I and III) multiplicious for findings, "reason[ing] that the accused's criminal conduct is most accurately reflected by Charge III," which "carries a lesser maximum punishment than the alternative in Charge I." Charges I and its specification were dismissed. 27 MJ 798, 804-05 (AFCMR 1988). "[T]he correct maximum [confinement] available" here "was eight years—five years under Charge II and three years under Charge III." We express no opinion on the correctness of this conclusion. Reassessing the sentence, the court found "appropriate only so much of the sentence as extend[ed] to a dishonorable discharge, total forfeitures, reduction to airman basic, and six years confinement." *Id.* at 805.

tested positive for HIV. He was sent to Wilford Hall Medical Center, Lackland Air Force Base, Texas, for evaluation. Appellant's out-patient medical treatment included extensive counseling, and he was provided with information regarding the dangers of transmitting HIV. He then returned to McChord AFB.

On the evening of December 13th, while driving in downtown Tacoma, Washington, appellant met JPH, a 17-year-old male, and offered him a ride home. During the drive, appellant and JPH agreed to buy beer and return to appellant's barracks room at the base.

Once in appellant's room, JPH drank several beers as well as a number of mixed drinks made with bourbon. Appellant and JPH engaged in petting and kissing, and appellant eventually performed consensual fellatio on JPH. Appellant then attempted to insert his finger into JPH's anus, but JPH objected; appellant stopped.[2] At that point, JPH was very intoxicated, so much so that he vomited three times. Appellant then laid on top of and beside JPH, and he "just laid . . . [his penis] around" JPH's anus. Appellant admitted that it was his original intent to have anal intercourse with JPH, but he claimed he never attempted to do so. In appellant's own words, after JPH vomited, appellant "lost interest." JPH agreed that appellant never actually tried to penetrate his anus with his penis.[3] JPH testified that appellant was not wearing a condom, but appellant claimed that he was. Appellant and JPH apparently left the barracks room on amicable terms, although JPH reported the episode to authorities the next day. JPH testified that if he had known appellant was infected with HIV, he never would have consented to any contact with him.

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[2] The record indicates that appellant engaged in other sexual acts with JPH, and that he had been advised that, although such practices did not constitute a high risk of transmitting the AIDS virus, they were not considered "safe sex."

[3] By both parties' account, appellant never attained full erection.

Lieutenant Colonel Richard E. Winn, U.S. Air Force Medical Corps, testified extensively as a medical expert for the Government. Dr. Winn described in detail how the Human Immunodeficiency Virus is transmitted. According to Dr. Winn, there is up to a 35 percent probability that an individual who tests positive for HIV will develop AIDS. In turn, the mortality rate for those testing positive for AIDS is presently 50 percent.[4] Dr. Winn also stated that the most dangerous transmission of HIV occurs through intravenous drug use and unprotected sexual intercourse, both heterosexual and homosexual. He indicated that the risk of transmission is increased "if one participates in anal intercourse" or if either of the partners "have genital ulcers, or ulcerations, or tears." Dr. Winn did testify that physical contact such as actually occurred in this case is "unlikely" to cause transmission of the AIDS virus.

Based upon this evidence, the military judge found that appellant had committed an assault with means likely to produce death or grievous bodily harm. Through special findings pertinent to Charge III and its specification, the military judge stated:

> [S]pecifically . . . *the accused attempted to have anal intercourse with* . . . [*JPH*]. The accused was infected with the Human Immunodeficiency Virus at the time of the attempt . . . , and he knew that he was so infected. I [the military judge] did not believe the accused's testimony that he used a condom.
>
> [T]he accused attempted with unlawful force or violence to do bodily harm to . . . [JPH] with the spe-

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[4] Other experts project "that 95% to 99% of those persons infected with HIV will develop the AIDS disease eventually." Sinkfield and Houser, *AIDS and The Criminal Justice System*," 10 Journal of Legal Medicine 103, 105 n.7 (No. 1 1989). While statistics such as these highlight the dangers of the virus if it is transmitted, aggravated assault still requires that the accused use or attempt to use the means in a manner likely to cause death or grievous bodily harm.

cific intent to do bodily harm. The accused's acts in lying naked on the back of . . . [JPH] with his penis at or near the anus . . . amounted to more than mere preparation and were done with the apparent present ability to do bodily harm. . . .

[U]nlawful force or violence . . . exist in this case because there is no legal justification or excuse for the acts. Further, there can be no lawful consent by a victim to this type of assault. . . .

[T]he specific intent involved here is a specific intent to do bodily harm. . . . [S]ee paragraph 54c(1)(b)(i) at page . . . IV-95 of the Manual for Courts-Martial.

Bodily harm means any physical injury to or offensive touching of another person, however slight. . . . [A]ny rational person would find it offensive to be touched by the Human Immunodeficiency Virus.

[T]he natural and probable consequence of the acts attempted by the accused would be the touching of . . . [JPH's body] by the Human Immunodeficiency Virus.

* * * *

I have considered the testimony that not every act of unprotected anal intercourse results in transmission of . . . [HIV], and I have considered the testimony that not everyone who is infected with the virus dies or suffers grievous bodily harm.

However, given the available medical testimony, I conclude that the . . . [HIV] is a means which is likely to produce death or grievous bodily harm.

(Emphasis added.)

I

With respect to issue I, it is now beyond cavil that it is permissible under the Code to charge aggravated assault, where the means alleged as likely to produce death

or grievous bodily harm is HIV. *See United States v. Stewart*, 29 MJ 92 (CMA 1989); *United States v. Womack*, 29 MJ 88 (CMA 1989); *United States v. Woods*, 28 MJ 318 (CMA 1989). An offense so charged is not void for vagueness. Appellant was provided adequate notice that he could be held criminally liable for consensual sodomy with another person, military or civilian, male or female. *See Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).[5] It is well-recognized that the military services and society at large have a compelling interest to ensure that those who defend the nation remain healthy and capable of performing their duty. *United States v. Womack, supra* at 90 (citing *National Treasury Employees Union v. Von Raab*, —— U.S. ——, 109 S.Ct. 1384, 1396, 103 L.Ed.2d 685 (1989)). Further, sodomy, consensual or otherwise, is not constitutionally protected conduct within the military. *United States v. Scoby*, 5 MJ 160 (CMA 1978); *United States v. Jones*, 14 MJ 1008 (ACMR 1982), *pet. denied*, 15 MJ 456 (1983).[6] Lastly, appellant's claim that he was denied fair notice that his semen or blood contained the means to inflict death or grievous bodily harm would leave any jurist incredulous. Once appellant tested positive for HIV, medical personnel made him overtly aware of the dangers of transmitting the virus should he have unprotected sexual contact with another person. This was substantiated by Dr. Winn and by appellant's own testimony.

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[5] The Court of Military Review noted that the criminal and civil law are changing rapidly in AIDS cases, and it opined that "a more accurate" pleading in this case would have been that appellant's semen, which carried the AIDS virus, was the "means likely to produce death or grievous bodily harm." 27 MJ at 802-03. Whether the means was alleged to be the virus itself, or the medium and the virus, does not seem significant to us. Even if it was, we agree that appellant was not prejudiced by the pleadings at trial and that he had adequate notice as to what was alleged against him. *Cf. United States v. Durham*, 21 MJ 232 (CMA 1986).

[6] *Cf. Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

We are satisfied that alleging aggravated assault under these circumstances does state an offense and that it is constitutionally permissible to charge such an offense under the Uniform Code.

II

Turning to the second issue, we note that Article 128 sets out four elements for the offense of assault with a means likely to produce death or grievous bodily harm. The Manual for Courts-Martial identifies these elements as follows:

> (i) That the accused *attempted* to do, offered to do, or did bodily harm to a certain person;
>
> (ii) That the accused did so with a certain weapon, means, or force;
>
> (iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and
>
> (iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

Para. 54*b* (4)(a)(i)-(iv), Part IV, Manual for Courts-Martial, United States, 1984 (emphasis added).

The first element of aggravated assault can be satisfied by a mere attempt, *i.e.*, "[t]hat the accused *attempted* to do . . . bodily harm to" a person. Although appellant testified that he did not attempt to penetrate JPH's anus with his penis, it is difficult to imagine how much further appellant would have had to go to commit an overt act constituting an attempt. *See* para. 54*c*(1)(b)(i), Manual, *supra*. Indeed, the military judge specifically found appellant guilty, beyond a reasonable doubt, of the offense of attempted anal sodomy. *See* n. 1, *supra*. Moreover, the military judge expressly stated his disbelief of appellant's claim that he wore a condom (which would have protected JPH from transmission of the virus).

The judge heard the evidence and observed the demeanor of the witnesses. As this Court is limited by Article 67(d), UCMJ, 10 § 867(d), "to matters of law," we are precluded from setting aside the military judge's findings of fact in light of the substantial evidence of record supporting those conclusions. *Cf. United States v. Hicks*, 24 MJ 3, 6 (CMA), *cert. denied*, 484 U.S. 827, 108 S.Ct. 95, 98 L.Ed.2d 55 (1987).

The *actus reus* of the crime, however, also requires conduct which goes beyond a simple offer of bodily harm. *See United States v. Stewart*, *United States v. Womack*, *United States v. Woods*, all *supra*. It is not necessary that such conduct actually cause death or grievous bodily harm, so long as the means employed is "used in a manner *likely* to produce . . . [such] harm." (Emphasis added.)[7] Evidence of record sufficiently demonstrates

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[7] *See* Comment, *Deadly and Dangerous Weapons and AIDS: The Moore Analysis is Likely to be Dangerous*, 74 Iowa L.Rev. 951 (1989). *See also United States v. Moore*, 846 F.2d 1163, 1166 (8th Cir.1988). The United States Court of Appeals for the Eighth Circuit held, *inter alia*, "that the medical evidence" of "record was insufficient to establish that AIDS may be transmitted by a bite." *Id.* at 1167-68.

The defendant, infected with AIDS, was an inmate at a federal medical facility and had intentionally bitten two corrections officers, admitting that he hoped biting the officers would cause them to contract the disease. *Id.* at 1165. The court held, however, that a human bite, irrespective of the presence of AIDS, can constitute assault with "a deadly and dangerous weapon." *Id.* at 1167. The Iowa Comment contends that because the *Moore* court held that assault with "a deadly and dangerous weapon" occurs when the means used is "*capable* of inflicting harm," instead of "*likely* to inflict harm," 74 Iowa L.Rev. at 964 (emphasis added, footnote omitted), it will ultimately allow a lower standard of proof in aggravated-assault cases involving AIDS.

Countless analogies can be made to having unprotected sex with an AIDS-infected partner, such as being assaulted with a gun with a single chamber loaded or carrying a briefcase which, unknown to the carrier, contains a bomb. *See United States v. Johnson*, 27 MJ at 803 and n.6 (citations omitted). Suffice it to say, it is beyond

that appellant's semen containing HIV was certainly a means capable of transmitting a deadly disease, thus producing death or grievous bodily harm. Moreover, the evidence shows that, in this era of heightened awareness and concern regarding the dangers of transmitting HIV, both the military and civilian communities recognize that, under many circumstances, AIDS is "the *natural and probable consequence*" of exposure to HIV. *United States v. Stewart*, *supra* at 93 (emphasis added); *see also* para. 54*c* (4)(a)(ii), Manual, *supra*.

Of course, whether the conduct of the accused involves a "means . . . used in a manner likely to produce death or grievous bodily harm" is a question to be determined by the factfinder. We agree with the court below that the legal question then becomes—"How likely is 'likely?'" 27 MJ at 803. Based upon our holdings in *Stewart* and *Womack*, it must at least be more than merely a fanciful, speculative, or remote possibility. The expert medical testimony which the military judge relied upon in this case was also sufficient as a matter of law in this regard. There was some competent evidence, therefore, upon which the military judge could find beyond a reasonable doubt that appellant *attempted* to do bodily harm to JPH, *i.e.*, engage in unprotected anal intercourse which would have been likely to transmit a disease which can ultimately result in death. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Hicks*, *supra*.

Although we are convinced that appellant was properly charged with an aggravated assault and that the elements of the offense were established in this case, we offer the following thoughts. The cases of *Stewart*, *Womack*, and *Woods* stand for the proposition that the military has a legitimate interest in prosecuting unprotected sexual contact which involves the risk of transmitting the

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cavil that, if the circumstances surrounding the sexual contact are such that HIV is likely to be transmitted, then the virus is a means likely to produce death or grievous bodily harm.

AIDS virus.[8] They do not stand for the proposition that persons infected with AIDS will be criminally stigmatized and punished more severely when their conduct does not risk transmission of the virus.[9] An era of heightened awareness should not be transposed into irrational fear, particularly in criminal law, whether in the military or civilian communities. *See Wiggins v. State*, 315 Md. 232, 554 A.2d 356 (1989).

The decision of the United States Air Force Court of Military Review affirming the findings and sentence as to sodomy and aggravated assault is affirmed.

Judge SULLIVAN concurs.

EVERETT, Chief Judge (concurring):

Appellant was found guilty of attempted anal sodomy and aggravated assault; but the Air Force Court of Military Review set aside the attempt conviction on grounds of multiplicity. Although this was a legally permissible option, I believe that, in a case like this, it would have been preferable for the Court below to have affirmed the finding of attempted sodomy, considered appellant's HIV infection as a factor in aggravation of that offense, and vacated the conviction of aggravated assault as multiplicious.

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[8] As indicated earlier, n.1, *supra*, the Court of Military Review held that the attempted sodomy was multiplicious for findings with the aggravated assault. This leaves open a question as to what offense, if any, appellant would have been guilty of if he had worn a condom throughout, though still not informing JPH of his infection, thereby arguably not attempting conduct which would have subjected JPH to the risk of contracting the AIDS virus.

[9] Apparently our concern is justified. One judge reportedly moved the sentencing proceedings to the courthouse parking lot, "stat[ing] that 'lots of space and sunshine' would" reduce the risk of the defendant's infecting court personnel with AIDS; other judges have "require[d] defendants [infected] with AIDS to enter pleas and receive sentences over the phone." *See* Comment, 74 Iowa L.Rev. at 952 n.11 (authorities omitted), *cited* in n. 7, *supra*.

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Sergeant NATHANIEL JOHNSON, JR., FR 436-11-4583
UNITED STATES AIR FORCE

ACM 26812

Dec. 22, 1988

Sentence adjudged 26 February 1988 by GCM convened at McChord Air Force Base, Washington. Military Judge: Michael B. McShane (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for ten (10) years, total forfeitures and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Lynne H. Wetzell.

Appellate Counsel for the United States: Colonel Joe R. Lamport; Lieutenant Colonel Robert E. Giovagnoni; Major Terry M. Petrie and Major Mark C. Ramsey, USAFR.

Before

LEWIS, BLOMMERS and KASTL
Appellate Military Judges

DECISION

KASTL, Senior Judge:

In *United States v. Womack*, 27 M.J. ——, (A.F.C.M.R. 1988), we upheld the court-martial convic-

tion of a non-commissioned officer who had AIDS (Acquired Immune Deficiency Syndrome). His offense was willful disobedience of an order of a superior commissioned officer under Article 90, UCMJ. That order, among other things, required him to take affirmative steps to caution and protect any future sexual partners.

But what if no order is given? Today, we address that question and affirm a conviction in an AIDS case under Article 128, UCMJ, for aggravated assault. In doing so, we resolve various issues raised by the accused, including due process, multiplicity, sufficiency of the evidence, and sentence appropriateness.

Factual Setting

Sergeant Johnson was screened for the Human Immunodeficiency Virus (HIV) at McChord Air Force Base, Washington in July, 1987. He tested positive for the virus; in September, he was sent to Wilford Hall Medical Center, Lackland Air Force Base, Texas for evaluation.

While a patient there, he attended a series of lectures, therapy sessions, and support groups dealing with his infection. He was briefed on the HIV phenomenon and safe sex practices, and he was advised how to prevent transmission of the infection. During an interview by medical personnel, he acknowledged his understanding of the information presented. One of the handouts distributed to the accused dealt in detail with the risks of sexual intercourse for those carrying the HIV virus. It advised how to lessen the dangers of transmitting that virus, described the degree of jeopardy inherent in various sexual practices, and explained the proper use of condoms. (Patients at Wilford Hall are not enjoined to abstain from sexual activity; rather, they are instructed in low risk sexual options.) Prior to departing the hospital on furlough, the accused was required to complete a "Pass for HIV Patient Privileges" form on which he

certified that he had been counseled regarding the HIV infection and its method of transmission. He acknowledged that he would inform sexual partners of his condition prior to sexual activity and utilize appropriate protective measures.

Meanwhile, by a memorandum dated 23 September 1987, the Assistant Secretary of the Air Force (Readiness Support) implemented a revised DOD policy governing HIV-infected servicemembers. The directive requires commanders of HIV-infected members to order them to adhere to what is taught in the preventive medicine counselings. It cautions that failure to follow these rules can result in administrative or disciplinary action.

Sergeant Johnson was never given such an order by his commander. Upon his return to McChord AFB, he was driving off-base when he encountered J.P.H., a 17-year old male. The two went to Sergeant Johnson's room and proceeded to drink. J.P.H. rapidly consumed five Southern Comforts, two English-type beers, and a 16-ounce beer. During the evening, Sergeant Johnson invited J.P.H. to lie on a white mink blanket on the floor. When he did, the accused performed fellatio on J.P.H. During the evening, J.P.H. became ill from his drinking and vomited into a paper sack which the accused took to the trash can in the room. J.P.H. then rolled onto his stomach, at which time the accused attempted to place his finger into J.P.H.'s anus. J.P.H. tightened his anus and told the accused to stop, which he did. Then, the accused laid on J.P.H.'s back; J.P.H. claimed to have felt the accused's unsheathed penis between his legs. J.P.H. vomited once or twice more. Eventually, the accused drove J.P.H. to the trailer where he lived.

The accused was found guilty by a military judge sitting alone of sodomy by fellatio (Article 125); and of aggravated assault (Article 128) and attempted sodomy (Article 80), both premised on the act of attempted consensual anal sex. The accused conceded that he was a

homosexual, and he pleaded guilty to fellatio with consent under Article 125. At trial, J.P.H. testified that if he had known his assailant had the AIDS virus, he would have left the accused's room.

The specific aggravated assault specification lodged against the accused states:

> In that SERGEANT NATHANIEL JOHNSON, JR., 62d Field Maintenance Squadron, McChord Air Force Base, Washington, did at McChord Air Force Base, Washington, on or about 13 December 1987, commit an assault upon [J.P.H.] . . . by attempting to penetrate his, the said [J.P.H.'s] anus with the said Sergeant Nathaniel Johnson, Jr's. penis, with a means likely to produce death or grievous bodily harm, to wit: the Human Immunodeficiency Virus, in that before on or about 13 December 1987, the said Sergeant Nathaniel Johnson, Jr. was infected with the Human Immunodeficiency Virus and knew he was so infected.

Aggravated Assault

The proper charging of AIDS-related misconduct has been a lively topic of debt. The range of possibilities is wide, from attempted murder [1] to assault [2] and it encompasses the possibility of pleading AIDS as an aggravating factor in such crimes as sodomy or adultery. *See*

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[1] *See People v. Richards*, No. 85-1715-F4 (68th Jud. Dist. Ct. Mich.) (AIDS victim spat on officer; charged with attempted murder). *See also State v. Phillips*, a South Carolina case, cited in Aids Policy & Law, October 7, 1987, p. 6.

[2] *See United States v. Moore*, 669 F.Supp. 289 (D. Minn. 1987), *aff'd.*, 846 F.2d 1163 (8th Cir. 1988) (assault with a deadly weapon, mouth and teeth of AIDS carrier) and *United States v. Kazenbach*, 824 F.2d 649 (8th Cir. 1987) (defendant, who had AIDS, bit, scratched, and spat upon a prison correctional officer). *See also Barlow v. Superior Court*, 190 Cal. App.3d 1652, 236 Cal. Rptr. 134 (1987).

generally United States v. Sargent, 18 M.J. 331 (C.M.A. 1984), and Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, Army Lawyer, January 1988, p. 17, 20ff. At least six courts-martial have been convened based upon AIDS-related assaults. *See* N.Y. Times, April 19, 1988 at Z6. In military jurisprudence, lessons in how to charge violations are found in both our own *Womack* case cited above and *United States v. Woods*, —— M.J. —— (N.M.C.M.R. 1988). There, the Navy-Marine Court granted a Government appeal under Article 62, UCMJ permitting a court-martial to go forward for unprotected male-female intercourse after the accused had been cautioned that he carried the HIV virus; the Navy offense was charged under Article 134, UCMJ. *See also United States v. Morris*, 25 M.J. 579 (A.C.M.R. 1987) (results of AIDS test should not have been suppressed by military judge at trial level).

We have no hesitation in concluding that certain HIV-related sexual acts are properly chargeable under Article 128, UCMJ. Since the proposition of "assault by AIDS virus" may appear novel at first glance, we will analyze it in some detail *vis-a-vis* the specific crime of aggravated assault with a means likely to produce death or grievous bodily harm.

1. *Means.* Did the accused use a *means* likely to produce death or grievous harm? We so hold. Commentaries on assault, either criminal or tortious, reveal that the term "means" appears to include almost anything used in a way that could cause death or injury. Under civilian law, such items as a spatula, an aggressive dog which is "sic'd" on someone, or even exposure to the weather have been held actionable. *See generally* 6 Am. Jur. 2d Assault and Battery Sec. 53 (1963). In military law, such disparate items as a meat fork, tape recorder, cowboy belt, or a United States Marine recruit

are "means" if used in the requisite way.[3] Viewed in light of these precedents, we are convinced that semen carrying the HIV virus indeed can be a "means" to commit aggravated assault. Our position is strengthened by numerous cases which have sustained claims of assault in an intimate setting when the perpetrator knowingly has spread venereal disease or herpes, or has falsely claimed he had a vasectomy.[4]

The law is developing rapidly in this area. When charging the offense, pinpointing the precise means employed by the accused to commit the assault can be difficult. In this complicated case, we believe a more accurate specification would have charged the accused with aggravated assault by attempting to penetrate the victim's anus with *semen*. The type of aggravated assault charged here is an "attempt-type" assault rather than an "offer-type;" it therefore requires a specific intent. *See* MCM, 1984, Part IV, paragraph 54c(1)(b)(i). Here, the intent of the accused was to gain sexual grat-

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[3] See the cases gathered at Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, Army Lawyer, January 1988 at 23.

[4] Cases where the perpetrator spread the herpes virus to unsuspecting victims and was held liable are *B.N. v. K. K.*, 312 Md. 135, 538 A.2d 1175 (Md. 1988) (herpetic defendant never told plaintiff of his condition; court found defendant knowingly engaged in conduct likely to infect others when he was aware of his infirmity; numerous cases analyzed) and *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273, 276-277 (Cal. 2d Dist. 1984) (any possible consent vitiated by fraudulent concealment). For prosecutions for assault where the defendant had venereal disease, *see State v. Lankford*, 29 Del. 594, 102 Atl. 63 (1917) and *Richard H. v. Larry D.*, 198 Cal. App. 3d 591, 243 Cal. Rprt. 807 (Cal. 1st Dist. 1984). Finally, for a case where the defendant told the prosecutrix he could not impregnate her because he had had an operation, *see Barabara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 432-433 (Cal. 1st Dist. 1983) (also cites Delaware, North Carolina, and Texas cases concerning assault by males having a venereal disease). *See generally* Annot., 40 A.L.R.3d 1089 (1980) for an exhaustive listing of cases.

ification by releasing semen. His semen carried the HIV infection and was the vehicle or "means" potentially causing harm or death. As to this matter, we discern no prejudice to the rights of the accused in the way the offense was charged. He was clearly on notice as to what was alleged against him. *See* R.C.M. 307(c)(3) and *United States v. Durham*, 21 M.J. 232 (C.M.A. 1986).

2. *"Used."* This means was "used" when the accused placed his penis near the accused's anus seeking sexual gratification. Through unprotected sexual coupling, he could well have deposited the HIV virus inside his victim's body, thus "using" the semen in a deadly or harmful way. As one writer puts it, such sexual conduct can be analogized to attempting to put poison in the drink of a victim.[5]

3. *Death or Grievous Bodily Harm as a Likely Result.* We are confident that the means was used in a manner so that death or grievous bodily harm would be a likely result. How likely is "likely?" No statistical model can predict the precise degree of danger sufficient to sustain a conviction. We are satisfied, however, that the expert testimony at trial adequately developed a degree of probability sufficient for a valid conviction. *See United States v. Baker*, 24 M.J. 354, 356 (C.M.A. 1987). It appears beyond dispute that AIDS is a chilling disease; as one New York court puts it, "[A]t no time in recent history has there been an issue capable of causing such anxiety and fear." *Anne D. v. Raymond D.*, 139 Misc.2d 718, 528 N.Y.S.2d 775 (1988). We reason that it is unnecessary that death or serious bodily harm be actually inflicted to uphold a conviction for aggravated assault. *See* MCM, 1984, Part IV, paragraph 54c(4)(a)(iv); *see also United States v. Schroder*, 47 C.M.R. 430, 434

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[5] See Wells-Perry, *supra*, at 23-24.

(A.C.M.R. 1973) (exposure to grenade; injury or death "could result").[6]

4. *Knowledge.* The accused had been counseled in depth at Wilford Hall; he was aware that his semen was highly likely to contain the HIV virus and that he could transmit a deadly disease to others with whom he might have intimate sexual conduct.

5. *Overt Acts Beyond Mere Preparation.* Did the accused's activity extend beyond "mere preparation" as that term is used in the Manual for Courts-Martial at paragraph 54c(1)(c)(i)? Yes. We believe it clear that the accused intended to have anal intercourse with J.P.H. It follows that he attempted to put "infected semen" inside the victim's anus. Factually, he was prevented from so doing when: (a) J.P.H. tightened his anus to stop the attempt; and (b) J.P.H.'s drunkenness and vomiting caused the accused to lose interest. *See United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987), and *United States v. Powell*, 24 M.J. 603 (A.F.C.M.R. 1987). Based upon the record, we are convinced that the accused committed overt acts toward sexual union that were sufficient to constitute a criminal attempt *See generally* MCM, 1984, Part IV, paragraph 54c(1)(c)(i).

6. *Consent.* It was argued at trial that J.P.H. consented to sexual acts with the accused. The defense noted the unique nature of assault by means of sexually transmitting a virus and likened it to other sexual offenses between adults. The defense then argued that if there was consent, the accused could not be guilty. We find this argument unpersuasive. In the first place, the

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[6] One commentator has likened the victim of an HIV assault to an individual handcuffed to a briefcase full of explosives. The briefcase may never explode, or it may explode and maim the victim, or it may kill. *See* Wells-Petry, *supra*, at 23. The analogy can be extended a step further. If the assailant does not inform the victim of his infection, it is as if the victim is handcuffed to the briefcase but does not even know the potentially-lethal briefcase is there!

victim's "consent" was uninformed; he did not know his partner was infected. Furthermore, regardless of consent, the military judge correctly found that consent by the victim is not a valid defense when the conduct is of a nature to be injurious to the public as well as to the party assaulted. *See United States v. Holmes*, 24 C.M.R. 762 (A.F.B.R. 1957); *United States v. Woods, supra.*; Annot., 58 A.L.R.3d 662 (1974); *see also* Binson, *Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS): AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 Hofstra L. Rev. 91 (Feb. 1985). We too find no valid consent here: Whatever the degree of assent to sexual by-play between the individuals, there was no approval by the victim to transmission of the AIDS disease.[7]

Constitutionality

The accused at trial urged the military judge to dismiss the aggravated assault specification on the basis that it was void for vagueness and violative of his Constitutional right of due process; the argument was premised on the contention that the accused was never informed that failure to follow the Wilford Hall counselings might lead to disciplinary action. In the defense view, this denied Sergeant Johnson fair notice that his conduct could be criminal due to his status as an HIV carrier.

We reject the accused's constitutional argument that the aggravated assault offense is vague since he was neither ordered to engage solely in "safe sex" nor coun-

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[7] One might look to standard tort analysis for a useful methodology to understand assault by HIV virus. Thus, the elements of duty; its breach; proximate causation; and assessment of damages, either punitive or financial, can be helpful. "Foreseeability" is another legal concept which can be employed in analysis. *See United States v. Henderson*, 23 M.J. 77, 79-80 (C.M.A. 1986).

selled that future sexual conduct might subject him to prosecution. He is not charged with failure to obey an order, but with aggravated assault under Article 128, UCMJ. An argument based on due process and fair notice, simply stated, is inapplicable to the offense of assault. There is no vagueness as to assault; the accused knew he carried the AIDS virus and that unprotected sex could harm his partner.

Moreover, we accept without reservation the proposition that the Air Force may impose reasonable regulation on sexual relations of servicemembers infected with AIDS. *See United States v. Womack* and *United States v. Woods*, both *supra*. For HIV-positive airmen who are sexually active, regulation is clearly waranted. *See generally Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (unique needs of military society).

Sufficiency of Evidence

The appellate defense brief strongly urges that the record is insufficient to support conviction of these offenses. We have most carefully analyzed the record, particularly the testimony of the various agents of the Office of Special Investigations, the accused, and J.P.H. We conclude that there is ample evidence to support the military judge's findings of guilty and his special findings on the aggravated assault charge, including his conclusion that the accused did not use a condom in his relations with J.P.H. Like the trial judge, we are convinced beyond a reasonable doubt that the accused is guilty of these offenses. *United States v. Lips*, 25 M.J. 679, 684 (A.F.C.M.R. 1986) and *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987).

Multiplicity

The accused argues that the offenses of consensual sodomy by committing fellatio and of attempted anal sodomy (Charges I and II) are multiplicious for sentenc-

ing. Although the matter is not without some authority on either side, we believe the better view is that these two offenses are not multiplicious for sentencing. *See United States v. Cox*, 18 M.J. 72, 74 (C.M.A. 1984); *United States v. Ziegler*, 14 M.J. 860 (A.C.M.R. 1982) *pet. denied*, 15 M.J. 461; and *United States v. Dearman*, 7 M.J. 713 (A.C.M.R. 1979). *But see United States v. Langford*, 15 M.J. 1090, 1094 (A.C.M.R. 1983).

We find it necessary to deal with another aspect of multiplicity in this case. At trial, the military judge found attempted anal sodomy and aggravated assault by means of the AIDS virus (Charges I and III) multiplicious for sentencing. We concur. However, the military judge did not address whether they are multiplicious for *findings*. We believe they are indeed multiplicious for findings. *See United States v. Baker*, 14 M.J. 361, 367 (C.M.A. 1983) and *United States v. Armusewicz*, 16 M.J. 418 (C.M.A. 1983) (Sum. Dis.); *see also United States v Demmer*, 24 M.J. 731, 736 (A.C.M.R. 1987) and *United States v. Meade*, 19 M.J. 894, 895 (A.C.M.R. 1985). We reason that the accused's criminal conduct is most accurately reflected by Charge III. We recognize that this is one of those rare situations where the matter which on its face appears the more serious (Charge III) carries a lesser maximum punishment than the alternative in Charge I. MCM, Part IV, paragraphs 51e(3) and 54e(8)(b) (1984). Nonetheless, we are persuaded that Charge III is the more accurate representation of what the accused did. See also MCM, Part IV, paragraph 4c (5)(f) (1984). We order Charge I and its specification dismissed.[8]

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[8] We pause to note another irony as to findings and sentence. At trial, the military judge found the accused not guilty of an Article 134 offense of assault with intent to commit sodomy. We surmise he did so because of the exigencies of proof and not because the charge was unproven. That offense carries a maximum of 10 years confinement. Charge II under Article 125 carries a five year maxi-

Sentence

Based on his evaluation of multiplicity, the military judge found that the maximum punishment available was a dishonorable discharge, total forfeitures, reduction to airman basic, and ten years of confinement. The military judge sentenced the accused to the maximum punishment allowed.

Under the circumstances the military judge applied an incorrect maximum punishment. As we understand it, the military judge concluded that there was a 10 year maximum in this case based upon a combination of two criminal actions (1) the sodomy by fellatio under Article 125 (Charge II); and (2) the attempt to commit sodomy by anal sex under Article 80 (Charge I). Since we find that Charge I has been subsumed within Charge III, it follows that the Charge III maximum is the one applicable here, i.e., a maximum of three years of confinement, dishonorable discharge, and accessory penalties. In short, the correct maximum available in this case was eight years—five years under Charge II, and three years under Charge III.

Based on the correct maximum punishment available of eight years of confinement, we will reassess. The record generally reflects a pathetic attempt at consensual homosexual contact. No force was used, and we can imagine far more aggravating circumstances on similar facts. Accordingly, we find appropriate only so much of the sentence as extends to a dishonorable discharge, total forfeitures, reduction to airman basic, and six years confinement.

Before concluding, we commend all advocates involved with this complex case. The case was well tried and well defended, and the appellate briefs were excellent.

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mum. Thus, under an alternative method of pleading, the maximum possible in the case could have been 15 years.

The findings of guilty and the sentence, as modified, are

AFFIRMED.

Senior Judge LEWIS and Judge BLOMMERS concur.

[SEAL]

OFFICIAL:

/s/ Carole V. Petti
CAROLE V. PETTI
Clerk of Court
Court of Military Review

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